United States Postal Service *and* Janet Fulmer. Case 10–CA–29640(P)

October 21, 1997

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND REMANDING

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge filed by Janet Fulmer, an individual, on September 26, 1996, the General Counsel of the National Labor Relations Board issued a complaint on February 24, 1997,[1] against the United States Postal Service, the Respondent, alleging that it had violated Section 8(a)(1) of the Act. Copies of the charge and the complaint were properly served on the Respondent. On March 14, the Respondent filed an answer to the complaint, denying the unfair labor practice allegations and affirmatively arguing that the case should be deferred for processing under the grievance-arbitration procedure of the collective-bargaining agreement between the Respondent and the American Postal Workers Union.

On April 7, the Respondent filed with the Board a Motion for Summary Judgment, arguing that the allegations should be deferred and that the complaint should be dismissed consistent with the policies of *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies*, 268 NLRB 557 (1984). On April 24, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Respondent's motion should not be granted. On May 8, counsel for the General Counsel filed a response opposing the Respondent's Motion for Summary Judgment.

The complaint alleges that the Respondent ceased assigning employee Janet Fulmer acting supervisor duties, and imposed more onerous working conditions on employees Jackie Poteet and Carolyn Appling because the three employees engaged in protected concerted activities. Specifically, the Respondent is charged with relieving Fulmer of acting supervisor duties in retaliation for her filing a class action grievance protesting the Respondent's distribution of hours. The Respondent is also charged with harassing Poteet and Appling, and imposing more onerous conditions on them, in reprisal for filing grievances.

The Respondent asserts that deferral is appropriate because the complaint allegations are cognizable as grievances under the collective-bargaining agreement, and because it has agreed—for a reasonable period—to process and arbitrate the complaint allegations regarding Fulmer, Poteet, and Appling. Counsel for the General Counsel contends that deferral is not appropriate because the grievance-arbitration mechanism is available only to parties to the contract, and not to individual grievance filers. Counsel for the General Counsel notes that the Union consistently has refused to process Fulmer's grievance because it involves assignment to a nonunit, supervisory position. Counsel for the General Counsel further asserts that because there is no claim or evidence that the Union's refusal is unlawful or undertaken to avoid arbitration, deferral is inappropriate. Finally, because Fulmer, Poteet, and Appling allege that the same supervisor retaliated against them for grievance filing, counsel for the General Counsel asserts that Appling's and Poteet's grievances are closely related to and intertwined with Fulmer's and similarly should not be deferred.

Having duly considered the matter, we find that summary judgment is not appropriate here. The grievance was filed by Charging Party Fulmer. Under the contract, Fulmer cannot independently process her grievance, and the Union steadfastly has refused to process it. A precondition of *Collyer* deferral is that the charging party have the ability to obtain arbitral consideration of the grievance. Here, because the Union has steadfastly refused to process Fulmer's grievance to arbitration and there is no evidence or even a contention that this refusal was unlawful or motivated to avoid deferral, we find that deferral is not appropriate.[2] Additionally, because there is a factual issue as to whether Poteet's and Appling's grievances are closely related to Fulmer's, we find that the complaint allegations as to these two employees likewise should not be deferred. See *Clarkson Industries*, 312 NLRB 349, 352 and fn. 12 (1993). Accordingly, we shall deny the Respondent's Motion for Summary Judgment.

[1] All subsequent dates are in 1997.

[2] We find this case distinguishable from *Consolidated Freightways Corp.*, 288 NLRB 1252, 1255–1256 (1988), petition for rev. denied sub nom. *Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991) (en banc), where the Board deferred to the arbitral procedure an unfair labor practice charge filed by an individual charging party. In that case, unlike here, the charging party could have (through his union) submitted to arbitration the contractual claim that was parallel to his charge, but he had failed to tell the union about it when the union was pursuing a related claim on his behalf. Id. at 1254. In holding that the charge was not rendered inappropriate for deferral simply because it was filed by an individual rather than by the union, the Board, inter alia, expressed concern that a contrary rule might allow unions to ''circumvent the contractual grievance procedure by the simple expedient of having the individual employee, instead of the union, file the charge.'' As noted above, there has been no allegation here that the Union is interested in circumventing the grievance-arbitration procedure in order to have the claim resolved elsewhere. Rather, the letter from the Union attached as exh. A to the General Counsel's ''Response to Notice to Show Cause'' indicates that the Union simply does not regard issues involving assignment to supervisory positions as grievable matters. As also noted above, no party has alleged that this position violates the Act.

ORDER

It is ordered that the Respondent's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 10 for further appropriate action.